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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 694

A. T. DESMEDT, PRESIDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN EXPORT LINES, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND LUDLOW CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. A 1–19) is not yet officially reported. The opinion of the district court (Pet. App. B 1–12) is reported at 249 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1966. The petition was filed on October 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission has authority to issue subpoenas for the production of documents in a proceeding instituted upon complaint of a private shipper to determine whether a proposed rate increase by a conference of carriers in foreign commerce is "so unreasonably high * * * as to be detrimental to the commerce of the United States" under Section 18(b)(5) of the Shipping Act of 1916.

2. Whether, when such subpoenas are served upon parties in the United States, they may require production of documents within the parties' possession which are located abroad.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are set forth in Appendix C to the petition.

STATEMENT

The Federal Maritime Commission brought an action to enforce compliance with subpoenas *duces tecum* issued by the Commission under Section 27 of the Shipping Act of 1916, 46 U.S.C. 826, to the petitioners herein. Each of the petitioners is either an officer or an agent of companies which are common carriers by water and member carriers of the Calcutta Conference, engaged in the transportation of commodities by water from East India and Pakistan ports to United States Atlantic and Gulf of Mexico ports (Pet. App. A 2). The Conference has common tariff rates, practices, and rules established pursuant

to an agreement approved by the Federal Maritime Commission on March 31, 1964, thus giving its domestic and alien member carriers exemption from the United States anti-trust laws (Pet. App. B 1). The underlying facts are undisputed.

1. THE ADMINISTRATIVE PROCEEDINGS

On July 6, 1965, the Calcutta Conference filed notice with the Commission of a general across-the-board rate increase (Pet. App. A 3). Ludlow Corporation, an American manufacturing concern which imported jute and jute products from Indian ports served by the Calcutta Conference and a signatory to a "dual rate" agreement, immediately protested this proposed increase in rates (Pet. App. A 3, B 1–2).

On August 10, Ludlow filed a formal complaint with the Commission pursuant to Section 22 of the Shipping Act of 1916, 46 U.S.C. 821, alleging that the rate increase was so "unreasonably high" with respect to certain jute products as to be "detrimental to the commerce of the United States" and "contrary to the public interest," in violation of Sections 14b, 15 and 18(b)(5) of the Shipping Act of 1916, as amended (Pet. App. A 3, R. 25a–31a [1]). In particular, the complaint alleged that the proposed rate increase had the immediate effect of "severely impairing the competitiveness of the named jute products and of reducing Complainant's importation of these products" (R. 27a). The Commission immediately referred the

[1] "R." refers to petitioners' appendix in the court of appeals.

matter to a hearing examiner. The Conference denied the allegations of the complaint (R. 32a–35a).

Ludlow, in preparing its case, unsuccessfully attempted to secure information from the members of the Conference on a voluntary basis (Pet. App. A 3). Thereafter, Ludlow applied to the Commission for issuance of subpoenas *duces tecum* pursuant to Section 27 of the Act, to compel the production of various documents from each of the petitioners (Pet. App. A 3). The documents sought were books and records showing the costs and earnings of the members of the Conference in the trade, together with information concerning the Conference's policies in determining rate levels (Pet. App. A 4).

The petitioners opposed the issuance of the subpoenas on the grounds (1) that the Commission has no authority to issue subpoenas to obtain "almost exclusively cost data, which could only be relevant to the question of 'reasonableness' " in a Section 18(b)(5) proceeding; and (2) that the Commission lacks authority to compel the production of cost data by carriers in international commerce because "[i]t would be unreasonable to demand production of cost data from the American-flag carriers, when such data cannot be obtained from foreign-flag carriers" (R. 44a–46a).

The Hearing Examiner granted the application for the subpoenas to the extent that the documents were located in the United States, but stated that Commission policy required that the Commission itself pass

on all requests for documents located abroad (Pet. App. A 5, R. 47a–54a, 13b–14b).

Ludlow then applied directly to the Commission for the issuance of additional subpoenas covering documents not located in the United States, and the Commission granted the application (R. 64a–67a). It rejected the argument that granting the additional subpoenas would "prejudice international shipping relations" as "in reality an appeal to the discretion of the Commission." The Commission stated (R. 67a):

> * * * where as here, we have before us a valid complaint seeking redress for an alleged injury, it is incumbent upon the Commission to insure that the complainant is afforded every means of securing redress to which he is entitled by the principles of due process and the fundamental requirements of fairness. Thus, we do not view the issue as involving Commission discretion. The complainant has shown that the information sought is relevant and material, and unless shown to be unduly burdensome that is all that is required. The application is hereby referred to the examiner for the issuance of the appropriate subpenas.

A hearing on the substantive issues raised by the complaint was scheduled for December 7, 1965. Five days before the hearing, petitioners informed the Hearing Examiner that they declined to comply with the subpoenas (Pet. App. A 5). On December 7 petitioners failed to appear or produce the subpoenaed records, and the hearing was recessed indefinitely

pending resort to these proceedings to enforce the subpoenas (R. 6b).

2. THE JUDICIAL PROCEEDINGS

The Commission applied to the district court for enforcement of the subpoenas, pursuant to Section 29 of the Act (46 U.S.C. 828). Ludlow was allowed to intervene in support of the Commission's application which was consolidated with a separate proceeding brought by Ludlow (Pet. App. A 5, B 1).

The district court directed compliance with the subpoenas. It found that petitioners are "all within the jurisdiction of the Commission; they maintain an office for the transaction of business in the United States; they have affirmatively sought and obtained examinations of the complainant Ludlow in the proceedings pending before the Commission and have answered the complaint." The district court concluded that "to compel them to produce evidence, wherever located, relevant and necessary to a determination of the charges made against them of violation of a statute under which they enjoy certain immunities is clearly within the power of the Commission" (Pet. App. B 10–11).

The court of appeals affirmed in an opinion by Judge Friendly, one judge dissenting. Following its decision in *Federal Maritime Commission* v. *Caragher*, 364 F. 2d 709 (C.A. 2) (Pet. App. D 1–19), the court held that the Commission had the power to subpeona documents in a proceeding instituted to determine whether a proposed rate issued by a conference carrier is so unreasonably high as to be detrimental to

the commerce of the United States and contrary to the public interest (Pet. App. A 6–7). The court also held that the Commission has the authority to issue a subpoena requiring the production of evidence from outside the United States. The court pointed out that Congress, in authorizing the Commission to compel the production of documents "from any place in the United States" (Section 27), intended that the Federal Maritime Commission, like the Interstate Commerce Commission, the other regulatory agencies and the federal courts, be able to "require a resident by subpoena to produce documents under his control wherever they are located" (Pet. App. A 13). The court noted that it would require "rather strong evidence to show that Congress wished to render an agency responsible for regulating an important segment of the foreign commerce of the United States powerless to require by subpoena that residents of this country and non-residents doing business here should produce relevant documents simply because they are kept outside our borders" (Pet. App. A 8).[2]

ARGUMENT

This case involves the authority of the Federal Maritime Commission to obtain, from a conference of carriers engaged in foreign commerce, evidence which is relevant and necessary to a determination of the charges made against them that their proposed rates were so unreasonably high as to be detrimental to the

[2] On September 19, 1966, the court of appeals granted petitioners' motion for a stay of mandate, conditioned on the filing of a petition for a writ of certiorari within thirty days thereafter (Pet. 8).

commerce of the United States in violation of the 1961 amendments to the Shipping Act. The decision below sustaining the Commission's authority is in accord with the congressional intent and with earlier decisions under the Shipping Act. Further review is not warranted.

1. The Commission has the authority and duty under the 1961 amendments to the Shipping Act (1) to cancel or modify conference rate-fixing agreements[3] that "operate to the detriment of the commerce of the United States" or are "contrary to the public interest" (Section 15); (2) to disapprove the use of dual-rate contracts that "will be detrimental to the commerce of the United States or contrary to the public interest" (Section 14b); and (3) to set aside rates filed by shipping conferences in foreign commerce that are "so unreasonably high or low as to be detrimental to the commerce of the United States" (Section 18(b)(5)). Petitioners contend (Pet. 12–19) that the Commission has no power to subpoena the documents needed in the exercise of that authority. Their argument is based upon the language of Section 27 of the Act, which authorizes the issuance of subpoenas for "purpose[s] of investigating alleged violations of this Act." They contend, in substance, that rates which are so unreasonably high or low as to be detrimental to American commerce are not in themselves "violations" of the Act, and that only the

[3] Under those agreements conferences in foreign commerce enjoy limited immunity from the anti-trust laws, provided that the agreements are subjected to "public scrutiny and examination by a governmental agency [the Federal Maritime Commission]." *Carnation Co.* v. *Pacific Conference*, 383 U.S. 213, 219.

utilization of such rates, after the Commission has disapproved them, can constitute a violation (Pet. 13).

Petitioners have suggested no reason consistent with the purposes of the Act why Congress, which imposed upon the Commission the duty of making the determinations required under Sections 14b, 15 and 18(b)(5), should have denied the Commission the means of obtaining the information and evidence necessary to make such determinations. In our view the courts below were clearly correct in rejecting petitioners' contention, just as the court of appeals previously rejected the identical argument in *Federal Maritime Commission* v. *Caragher,* 364 F. 2d 709 (Pet. App. D 1–19), as "inconsistent with both the ostensible purpose of the regulatory pattern established by the Shipping Act of 1916 and the legislative history of Section 27" (Pet. App. D 10–11).

As the court of appeals recognized (Pet. App. D 13–15), Congress adopted the "alleged violations" language of Section 27 to avoid the problems created by the Interstate Commerce Act's discovery provision, which permitted subpoenas to issue "for the purpose of this act." In *Harriman* v. *Interstate Commerce Commission,* 211 U.S. 407, this Court ruled that the Interstate Commerce Commission did not have authority to issue subpoenas in aid of investigations directed to the development of possible legislative recommendations, and that it could compel the production of evidence only in investigations "to discover any facts tending to defeat the purposes of the act," that is, for investigations made as a result of "complaints for violation of the act" or upon

"matters that might have been the object of a complaint." 211 U.S. at 417, 419, 420. The House Committee, in adopting the present language of Section 27, which was patterned on the Interstate Commerce Act, simply adopted for the Maritime Commission the judicial gloss which this Court in *Harriman* had already placed on the Interstate Commerce Commission's power, limiting the subpoena authority to quasi-judicial proceedings. 53 Cong. Rec. 8081. See, H. Rep. No. 659, 64th Cong., 1st Sess., p. 33. Pet. App. D 13–15. Thus, the court of appeals was correct in ruling (Pet. App. D 16–17) that the term "violations" has a broader scope in Sections 22 and 27 than in the Act's penal provisions. See, *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 764–766.

Nor is there any merit to petitioners' suggestion (Pet. 13–14) that the legislative history of the 1961 amendments supports its restrictive construction of the Act. On the contrary, Senator Kefauver, the sponsor of the amendment which became Section 18(b)(5), believed that under his amendment conference rates that were so unreasonably high or low as to be detrimental to American commerce would be "outlawed." 107 Cong. Rec. 19429. Indeed, he stated that his amendment merely codified the pre-existing administrative interpretation that such unreasonable rates were violations of the Act. 107 Cong. Rec. 19430. Thus, the history of the 1961 amendments confirms the inference that Congress regarded such unreasonably high or low rates as violative of the standards that the Commission is to enforce. It follows that the Com-

mission not only has authority under Section 22 to investigate and adjudicate complaints alleging such violations, but that it has authority under Section 27 to compel the production of relevant evidence and testimony.

2. Petitioners also contend (Pet. 19–27) that the court below erred in affirming the enforcement of the Commission's subpoenas, served within the United States, requiring the production of documents located in petitioners' offices abroad. As the court noted (Pet. App. 7), this contention is "surprising as a matter of common sense," inasmuch as the production of documents located abroad may be compelled in civil, criminal and administrative proceedings. See 28 U.S.C. 1783; 26 U.S.C. 7602; Fed. R. Civ. P. 45 (e)(2); Fed. R. Crim. P. 17(e)(2); *First National City Bank* v. *I.R.S.*, 271 F. 2d 616 (C.A. 2), certiorari denied, 361 U.S. 948, rehearing denied, 362 U.S. 906. Moreover, as the court of appeals noted (Pet. App. A 8), it is difficult to attribute to Congress an intent to prevent the Commission from obtaining relevant documents from firms doing business in the United States simply because the documents are kept outside our borders. The Commission is charged with regulating foreign-based carriers and would be seriously hampered in discharging its statutory duties of setting aside rates and practices detrimental to American commerce if it did not have the power to reach documents located abroad which were in the possession of persons subject to process here.

The "plain" language of Section 27 relied on by petitioners to reach a contrary result is misleading.

In *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 218 (C.A. 9), the Court of Appeals for the Ninth Circuit has held that similar language in Section 19(b) of the Securities Act of 1933 ("from any place in the United States or any Territory-at any designated place of hearing") authorized the SEC to require a resident to produce documents located abroad.[4] See, also, *Mines and Metal Corp.* v. *SEC*, 200 F. 2d 317, 320 (C.A. 9), certiorari denied, 345 U.S. 941.

Section 27 of the Shipping Act was modeled on Section 12 of the Interstate Commerce Act (49 U.S.C. 12) to which the phrase on which petitioners rely had been added by Congress in 1891. 26 Stat. 743–744. The legislative history of the 1891 amendment makes it clear that the purpose of the amendment was not to curtail the reach of the ICC's subpoenas but rather to lay to rest the objection "that the attendance of witnesses can not be required outside of the judicial district in which they reside" (3 ICC Ann. Rep. 108 (1889)), and "to make clear the obligation of witnesses to attend before the Commission in obedience to subpoenas regardless of the boundaries of judicial districts" (4 ICC Ann. Rep. 68 (1890)). Because the phrase incorporated in the Interstate Commerce Act and subsequently carried over into the Shipping Act was so clearly not designed to restrict the reach of agency subpoenas, there is no sound reason for construing it so as to prevent the Commission from fulfilling its statutory functions. Certainly no con-

[4] This Court cited the *Minas de Artemisa* decision with approval in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289, fn. 17.

gressional intent to create foreign sanctuaries for carriers' documents can be found in light of Section 21 of the Act (46 U.S.C. 820) under which it is well settled that the Commission may require carriers and conferences subject to the Act to produce documents located abroad. *Montship Lines, Ltd.* v. *Federal Maritime Board* 295 F. 2d 147, 153–154 (C.A.D.C.);[5] *Kerr Steamship Co.* v. *United States*, 284 F. 2d 61, 63–64 (C.A. 2), vacated as moot, 369 U.S. 422.[6] Thus,

[5] Contrary to petitioners' contention (Pet. 27), no inference is to be drawn from the failure of Congress to enact proposed modifying legislation, for public policy requires that agencies feel free to ask for legislation which will terminate or avoid litigation. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47, modified, 339 U.S. 908; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 609–611. That policy is particularly appropriate here, because the Commission's request in 1961 for broad legislation not only requiring the production of documents abroad but also requiring each carrier to maintain an agent for service of process in this country was prompted in large part by the challenges to the Commission's Section 21 powers in the *Montship Lines* cases (H. Rep. No. 498, 87th Cong., 1st Sess., p. 23; see Pet. 26–27). To the extent that the Commission's proposal was based on the restrictive arguments as to the scope of Section 21 in *Montship*, the rejection of those arguments by the court of appeals, prior to Senate consideration of the bill, made the proposed amendment unnecessary.

[6] In *Kerr Steamship Co.* v. *Federal Maritime Commission*, 369 U.S. 422, this Court vacated the decision of the Second Circuit, upon the suggestion by the Commission that it was moot. In view of the decision of the Court of Appeals for the District of Columbia Circuit remanding the proceedings in *Montship* because the Commission's orders failed to state the purposes for which the orders were issued, the Maritime Commission had set aside as to petitioners therein the Section 21 order "so as to put them on a par with the carriers who secured relief in the *Montship* case." (See Memorandum for the Respondents Suggesting Mootness, Oct. Term, 1961, No. 29 at p. 2.)

while the decision below conforms the Commission's authority to compel the production of documents abroad which are in the possession of persons who are subject to process in the country but are not parties to the proceedings before the Commission, it has little practical impact upon petitioners and other carriers, who are in all events subject to the Commission's authority under Section 21.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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